Supreme Court, U.S.
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In The

Supreme Court of the United States

WRENCH TRANSPORTATION SYSTEMS, INC.
and JAMES MALONE, JR.,

Petitioners,

v.

JOHN F. KENNEDY and LEAH ANN MACMAHON,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Substantive Due Process prohibit a State from wrongfully seizing personal property, or does the prohibition apply only to real property, as the Third Circuit held?

2. Does 42 U.S.C. § 1983 provide a remedy when a State actor, having determined that previously seized personal property is no longer subject to forfeiture, nonetheless refuses to return the property unless and until the owner agrees to confer a personal benefit on the State actor?

LIST OF PARTIES

In addition to the parties listed on the cover, the following were Defendants in the proceedings below, but whose interests are not implicated by this Petition:

Frank Bradley

Maryanne Lewicki

CORPORATE DISCLOSURE STATEMENT

Plaintiff Wrench Transportation Systems, Inc. has no parent company, and no publicly held company owns 10% or more of the corporation's stock.

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CITATIONS FOR OPINIONS BELOW

The District Court's Opinion granting summary judgment (App. 12–38) was not published.

The Third Circuit's Opinion affirming the grant of summary judgment (App. 1–9) was not published.

The Third Circuit's Order denying rehearing (App. 41–42) was not published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its decision on July 28, 2009, and denied rehearing on October 16, 2009. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const., Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 ("Section 1983")

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE[1]

Wrench Transportation Systems, Inc. and its sole shareholder, James Malone (together, "Wrench") operated a waste-hauling business. Wrench owned and used six vehicles (the "Wrench Vehicles") that were critical to the company's operations.

As part of an investigation into allegedly illegal waste hauling, the State of New Jersey initiated an *in rem* forfeiture action against, and seized, the Wrench Vehicles in August 1993. Defendant John Kennedy was the Deputy Attorney General in charge of the underlying criminal prosecution; Defendant Leah Ann MacMahon was the Deputy Attorney General who brought the forfeiture action.

The State's investigation exonerated Wrench, which if anything had been an innocent pawn in others' wrongdoing. Thus, as early as January 15, 1994, Defendants advised Wrench that the Wrench Vehicles were not properly subject to forfeiture. But as a precondition to returning the Wrench Vehicles to Wrench, Defendants insisted that Wrench provide testimony against someone higher up in the investigation. Wrench was unable to do so because it had no knowledge of wrongdoing. Thus, the State returned the Wrench Vehicles to their respective lien holders.

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[1] Because the District Court granted summary judgment, this Statement of the Case is made in the light most favorable to the Petitioners.

The lien holders liquidated all but one of the vehicles, yielding no surplus.

As of May 1995, the last of the Wrench Vehicles was still being held subject to the forfeiture action. MacMahon refused to release that vehicle to Wrench unless and until Wrench signed a release in Defendants' favor. Wrench refused to sign such a release. Ultimately, the State dismissed the forfeiture action in May 1999 – almost 6 years after it was commenced. No criminal charges were ever filed against Wrench.

Wrench sued Defendants and others in the United States District Court for the District of New Jersey, asserting claims under Section 1983. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1343. The District Court granted summary judgment dismissing all claims on November 28, 2007. Wrench appealed to the Third Circuit, with jurisdiction premised on 28 U.S.C. § 1291. The Third Circuit affirmed on July 28, 2009, and denied rehearing on October 16, 2009. This Petition for a Writ of Certiorari follows.

ARGUMENT

Section 1983 provides a remedy when a State actor deprives a citizen of any "right . . . secured by the Constitution." The Panel dismissed Wrench's claims on the ground that the right at issue – an ownership interest in personal property used for business

purposes – was not secured by the United States Constitution. Instead, the Panel held that protection from unreasonable seizure by the States extends only to real property. (App. 7). Because this conclusion is contrary to Supreme Court authority, and because this case involves important questions of Constitutional law, a writ of certiorari should issue.

I. Certiorari should issue because the Panel's opinion contravenes Supreme Court authority by failing to distinguish between the incorporation and simpliciter strains of Substantive Due Process.

The Due Process Clause of the Fourteenth Amendment bars States from "depriv[ing] any person of life, liberty, or property, without due process of law." On its face, this limitation might appear to be exclusively procedural. But this Court has recognized that the Due Process Clause has two substantive strains as well. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The first strain of Substantive Due Process "incorporates" provisions of the Bill of Rights that otherwise apply only to the Federal government, making those provisions applicable to the States as well. *Id.*; *see also Albright v. Oliver*, 510 U.S. 266, 272–73 (1994) (summarizing the historical development of incorporation); *Ker v. California*, 374 U.S. 23, 30 (1963) (holding that the Fourth Amendment's prohibition against unreasonable search and seizure applies to the States pursuant to the Fourteenth Amendment). The second strain of Substantive Due

Process, sometimes known as the "simpliciter" strain, prohibits State action that is so arbitrary or wrongful as to be substantively improper, "regardless of the fairness of procedures used to implement them." *Zinermon*, *supra*, 494 U.S. at 125; *Parratt v. Taylor*, 451 U.S. 527, 536 (1981).

The Panel analyzed whether the State's conduct in this case deprived Wrench of its rights under the simpliciter strain of Substantive Due Process. (App. 6–9). But the Panel did not address whether the State's conduct violated the Fourth Amendment's prohibition against unreasonable searches and seizures, as applied to the States pursuant to the "incorporation" strain of Substantive Due Process. This case was plead and argued below as a wrongful-seizure case under the Fourth and Fourteenth Amendments. Thus, the Panel erred by analyzing the claims solely under the simpliciter framework.

The Panel's opinion, analyzed under an incorporation framework, contravenes Supreme Court authority as well as the plain language of the Fourth Amendment. That Amendment prohibits unreasonable seizure of "effects." At the time the Fourth Amendment was adopted, the term "effects" was specifically understood to include business property. *See Altman v. City of High Point*, 330 F.3d 194, 201 (4th Cir. 2003) (noting that a 1730 dictionary defined "effects" as "the goods of a merchant, tradesman, & c"); *see also* Black's Law Dictionary 592 (9th ed. 2009) (defining "effects" to mean "movable property; goods"). Thus, there can be no doubt that the term

"effects" includes a fleet of vehicles used for a business.

This conclusion is consistent with the manifest intent of our founding fathers in drafting the Fourth Amendment, and with an originalist understanding of the Amendment's scope. It is safe to say that a blacksmith in the late 18th Century would have expected his anvil to be considered an "effect" entitled to protection from unreasonable seizure. Yet the Panel's opinion would dictate a contrary result.

This Court routinely applies the Fourth Amendment to prohibit unreasonable seizures of personal property. *E.g.*, *Soldal v. Cook County*, 506 U.S. 56, 61–71 (1992) (seizure of mobile home and its contents); *U.S. v. Jacobson*, 466 U.S. 109, 124–25 (1984) (seizure of powder for chemical testing). At least one Circuit Court has held that Section 1983 provides a remedy for an unreasonable seizure of personal property by a State actor. *See Davis v. Bayless*, 70 F.3d 367, 375 (5th Cir. 1995); *see also Reitz v. County of Bucks*, 125 F.3d 139 (3d Cir. 1997) (assuming, without discussion, that the Fourth Amendment applies to a case involving seizure of personal property); *Schrob v. Catterson*, 948 F.2d 1402 (3d Cir. 1991) (same).

Here, the Panel overlooked the "incorporation" strain of Substantive Due Process jurisprudence in holding that Wrench's interest in the Wrench Vehicles was not Constitutionally protected. Because this analysis fundamentally conflicts with Supreme Court

and Circuit Court authority, a writ of certiorari should issue.

II. Certiorari should issue because, even under the simpliciter strain of Substantive Due Process, the Wrench Vehicles qualify as a fundamental interest in property.

Moreover, were this case guided by principles of Substantive Due Process simpliciter, personal property would nonetheless be subject to protection as a "fundamental right." "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). "Rights are fundamental when they are implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003). Ownership of personal property is a fundamental Constitutional right, "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition." This Court should issue a writ of certiorari to review the Panel's conclusion to the contrary.

The Panel's opinion cites a string of cases establishing that rights created solely by state law – such as employment tenure rights, or the right to a public contract – are not fundamental, and thus are not protected by the simpliciter strain of Substantive Due Process. (App. 7–8). The conclusions in the cited cases are sound because the property interests in

question were not rooted in a property interest of a type that would have existed in 1787, much less ones that would have been considered "deeply rooted in the Nation's history." The mere fact that such rights may have come to be recognized as "property" under modern law does not give them a Constitutional dimension.

But the Panel sought to squeeze a round peg into a square hole by characterizing Wrench's interest as a "right to 'engage in business'" that is "more similar to the type of intangible employment rights that the Court has rejected as not protected by substantive due process." (App. 7). The Panel did mention that Wrench also "asserted a right to the ownership of the trucks" (App. 7), but this significant point was lost in the remainder of the analysis.

Ownership of tangible personal property is an interest that dates back thousands of years. *See, e.g.*, Exodus 20:15 ("Thou shalt not steal."). It is hard to imagine a right that is more "deeply rooted" in our history, or more "implicit in the concept of ordered liberty." Accordingly, the Panel erred by concluding that Wrench's interest in the Wrench Vehicles was not a "fundamental" right protected by the Constitution.

III. Certiorari should issue because this case involves a monumental question of Constitutional law – can a State actor be held accountable for wrongfully seizing personal property?

Whether ownership of personal property is a Constitutionally protected right, and thus whether it is protected by reasonable limitations upon seizure, are questions of great importance to citizens of this Nation, and to the parties in this case.

Wrench owned the Wrench Vehicles, and depended on those vehicles to operate their business. Defendants seized the Wrench Vehicles in connection with a criminal investigation, but later determined that the vehicles were not properly subject to seizure. Rather than return the vehicles, Defendants abused their position of authority by refusing to release the vehicles unless Wrench offered untrue testimony against other targets, and unless Wrench agreed to sign a release exonerating Defendants from personal liability.

Such abuses, and the proper reach of seizures more generally, is a critical issue. Under the Panel's decision, the State would be entitled to seize personal property whenever it wanted to, for whatever reason, without any risk of offending the Constitution.

By issuing a writ of certiorari last term in *Alvarez v. Smith*, 129 S. Ct. 1401 (2009), this Court recognized that curbing abuses of this nature is an important issue meriting consideration. Unfortunately,

there is a "paucity of guidance" from this Court regarding the scope of Substantive Due Process simpliciter in this and similar contexts. *See, e.g.*, *DeBlasio v. Zoning Board*, 53 F.3d 592, 598 (3d Cir. 1995). Accordingly, a writ of certiorari is warranted.

IV. Granting a writ of certiorari would consume relatively little of this Court's resources because summary disposition would be appropriate.

The Third Circuit panel addressed the case under the wrong analytical framework. Petitioners respectfully request that this Court grant certiorari, vacate the judgment below, and remand to the Third Circuit for reconsideration of the case under the correct analytical framework.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-4817

WRENCH TRANSPORTATION SYSTEMS, INC.;
JAMES MALONE, JR.,

Appellants

v.

FRANK BRADLEY; JOHN F. KENNEDY;
MARIANNE [sic] LEWICKI;
LEAH ANN MCMAHON [sic]

On Appeal from the United States District Court
for the District of New Jersey
(No. 95-cv-06203)
District Judge: Honorable Jose L. Linares

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 20, 2008

Before: BARRY and CHAGARES, *Circuit Judges* and RESTANI, *Judge*[1]

(Filed: July 28, 2009)

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[1] The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

OPINION OF THE COURT

CHAGARES, *Circuit Judge.*

Plaintiffs Wrench Transportation Systems, Inc. and its sole stockholder, James Malone, Jr. ("Malone") appeal the District Court's grant of summary judgment in favor of defendants John Kennedy and Leah Ann McMahon ("Kennedy" and "McMahon"). Because we find that Malone is not entitled to substantive due process protection for his purported interest in either his right to "engage in business" or his personal property ownership of his trucks, we will affirm the District Court's grant of summary judgment in favor of Kennedy and McMahon.

I.

Because we write only for the parties, we will only address the facts that are relevant to our analysis. This case arises out of the civil forfeiture of certain Malone trucks seized in connection with a New Jersey state criminal investigation about the illegal transport of waste oil. Malone claims that the defendants violated his substantive due process rights when they allegedly refused to return the Malone vehicles unless Malone signed a release and provided testimony for them in connection with the criminal investigation.

To pursue this claim, Malone sued Frank Bradley (a New Jersey state investigator) ("Bradley"), Marianne Lewicki (a New Jersey state investigator)

("Lewicki"), Kennedy, and McMahon under 42 U.S.C. § 1983. In 2003, the District Court granted summary judgment to defendant Marianne Lewicki on the grounds of absolute immunity. *See* Appendix (App.) 14-15. Malone did not appeal that decision. In *Wrench Transp. Serv., Inc. v. Bradley,* 136 F. App'x 521 (3d Cir. 2005) ("*Wrench I*"), we found that Bradley was entitled to qualified immunity because Malone was unable to show a causal connection between Bradley's actions and the return of the Malone trucks. *See Wrench I,* 136 F. App'x at 522. At that time, we declined to decide whether Malone had a protectible substantive due process interest. *Id.*

In *Wrench Transp. Sys., Inc. v. Bradley,* 212 F. App'x 92, 98-100 (3d Cir. 2006) ("*Wrench II*"), we found that Kennedy and McMahon were not entitled to absolute immunity for their alleged actions in connection with their post-seizure conduct regarding Malone's property, because they were acting in an investigatory, rather than a prosecutorial, capacity. We also held that there was no evidence that Kennedy or McMahon tried to coerce false testimony from Malone in exchange for the trucks. *Id.* at 100.

The case then returned to the District Court, where Kennedy and McMahon argued both that Malone had failed to show that his substantive due process rights were violated, and that, even if Malone's rights had been violated, Kennedy and McMahon were still entitled to qualified immunity. The District Court granted summary judgment in favor of Kennedy and McMahon. It found that, with

regard to Kennedy, Malone had failed to establish a causal connection between Kennedy's actions and his alleged injuries, as he was required to do, and that Kennedy was entitled to summary judgment. *See Wrench Transp. v. Bradley,* No. 95-cv-06203, 2007 WL 4233011 at *4, *9 (D.N.J. Nov. 29, 2007) ("*Wrench III*"). In addition, the District Court noted that even if Malone had established a causal connection between Kennedy's actions and his alleged injuries, his failure to establish that he had a property interest that is protected by substantive due process would result in the failure of his claim. Although the District Court held that McMahon's actions met the causal connection standard, it nevertheless found that McMahon was entitled to summary judgment because Malone failed to establish a substantive due process violation, a showing which is required for a 42 U.S.C. § 1983 claim. *Id.* at *8.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291. This Court reviews the grant of summary judgment de novo. *Gonzalez v. AMR,* 549 F.3d 219, 223 (3d Cir. 2008). "Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted). *See* Fed. R. Civ. P. 56(c). When analyzing a summary judgment claim, "we must view the facts in the light most favorable to the non-moving party, and

draw all reasonable inferences therefrom in that party's favor." *New Jersey Transit Corp. v. Harsco Corp.*, 497 F.3d 323, 326 (3d Cir. 2007) (citation omitted).

III.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." It is a remedial statute; it does not create rights. *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). To succeed on a § 1983 claim, "a plaintiff must show that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005) (citation omitted). Thus, we first look to see whether Malone was deprived of a constitutional right. The District Court found that he was not. We agree.

Malone contends that Kennedy and McMahon violated his rights under the substantive due process clause of the Fourteenth Amendment when they failed to return the Malone trucks. He argues that "ownership of trucks, which are used to support [a]

business, is a property interest protected by the Constitution. . . ." Appellant Br. at 27-28. He also contends that he has a fundamental right to "conduct business." *Id.* at 30.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV. Substantive due process is a "component of the [Fourteenth Amendment] that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Supreme Court explained in *Collins* that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this . . . area are scarce and open-ended." *Id.* (citation omitted). *See also Nicholas v. Pa. State. Univ.*, 227 F.3d 133, 140 (3d Cir. 2000) (citation omitted) ("The history of substantive due process 'counsels caution and restraint.'").

Whether the property right asserted is entitled to substantive due process protection depends on whether it is considered "fundamental." *Nicholas*, 227 F.3d at 140. Fundamental rights are rights that are "deeply rooted in the Nation's history and traditions. . . . [and] interests implicit in the concept of ordered liberty like personal choice in matters of marriage and family." *Id.* at 143 (citations and

quotation marks omitted). While this Court has found that there can be a fundamental interest in real property, interests like "a low bidder's entitlement to state contract" as well as an entitlement to public tenured employment are not fundamental. *Id.* at 142. Indeed, Malone concedes that this Court has held that employment is not a protected property interest under a substantive due process analysis.

Here, we agree with the District Court's finding that Malone's asserted interests – the right to "engage in business" and his right to the ownership of the trucks – are more similar to the type of intangible employment rights that this Court has rejected as not protected by substantive due process than the real property interests which can be protected by substantive due process. *Cf. Leib v. Hillsborough County Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 n.4 (11th Cir. 2009) (noting that while the plaintiff "abandoned" his claim that he was deprived of the "right to earn a living" nevertheless it "would have failed in any event given . . . that employment rights do 'not enjoy substantive due process protection. . . .'"); *Hill v. Borough of Kutztown*, 455 F.3d 225, 234 n.12 (3d Cir. 2006) ("To the extent [plaintiff's] substantive due process claim was based not only on loss of his job, but also on reputational injury that decreased his 'ability to earn a living,' it also fails."); *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005) ("The right to 'make a living' is not a 'fundamental right' . . . for substantive due process purposes."). In addition, while we have stated that "ownership is a property

interest worthy of substantive due process protection," *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600 (3d Cir. 1995), *abrogated on other grounds by United Artists Theatre Cir., Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003), in *Nicholas*, we noted: "we have so far limited non-legislative substantive due process review to cases involving *real property* ownership." 227 F.3d at 141 (emphasis added). Accordingly, we conclude that Malone has failed to establish that his personal property interest in his trucks is "fundamental" for purposes of our Fourteenth Amendment substantive due process analysis.

We therefore find that Malone has failed to establish that he has a property right which is protected by the Constitution.[2] Because Malone has failed to establish any substantive due process right here, regardless of the any [sic] causal connection between Kennedy and the return of the trucks, the arguments that Malone makes in his brief regarding potential genuine issues of material fact with regard to whether Kennedy caused a deprivation of his

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[2] Because we find that Malone's claim does not establish the deprivation of a Constitutional right, we need not determine whether Kennedy and McMahon are entitled to qualified immunity. *See Pearson v. Callahan*, 129 S. Ct. 808, 815-18 (2009) (upholding the two prongs of qualified immunity analysis – that a plaintiff must show a "violation of a constitutional right" and that the right was "clearly established" – but finding that they do not necessarily have to be examined in a particular order).

rights are rejected. Accordingly, the District Court did not err in granting summary judgment in favor of Kennedy and McMahon.

We briefly note that Malone also argues that the District Court erred when it found that Malone was barred from challenging a protective order that had been issued by the Magistrate Judge in this case because Malone had not filed timely objections. This Court has previously considered and rejected Malone's argument on this issue. *Wrench II*, 212 F. App'x at 100-01. We are not inclined to disturb our prior decision, and will therefore affirm the District Court's ruling.

V.

For the foregoing reasons, we affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-4817

WRENCH TRANSPORTATION SYSTEMS, INC.;
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---

[1] The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on November 20, 2008.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this Court that the judgment of the United States District Court for the District of New Jersey entered November 29, 2007 is hereby affirmed. All of the above in accordance with the opinion of this Court.

Costs taxed against appellants.

Attest:

/s/ Marcia M. Waldron, Clerk

DATED: July 28, 2009

2007 WL 4233011 (D.N.J.)

NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
WRENCH TRANSPORTATION, et al., Plaintiffs,
v.
Frank BRADLEY, et al., Defendants.
Civil Action No. 95-cv-06203 (JLL).

Nov. 29, 2007.

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Robert P. Shane, Brian G. Flanagan, Office of the NJ Attorney General, Trenton, NJ, for Defendants.

OPINION

LINARES, District Judge.

This matter comes before the Court by way of cross-motions for summary judgment filed by Plaintiffs, Wrench Transportation Systems, Inc. and James Malone, Jr. [CM/ECF Docket Entry No. 101], and Defendants, John Kennedy and Leah Ann McMahon [CM/ECF Docket Entry No. 100]. The Court has considered the submissions made in support of and in opposition to the motions. No oral argument was heard. Fed.R.Civ.P. 78. For the reasons set forth below, Defendants' motion for summary judgment is GRANTED and Plaintiffs' motion for summary judgment is DENIED.

BACKGROUND

1. Factual Background

A detailed factual background of this case was set forth by the Court on the record on September 16, 2003 and October 27, 2003, and will not be repeated here, except where necessary to provide context for the pending motions for summary judgment.

Generally speaking, this action arose from Defendants' seizure of several vehicles which Plaintiffs utilized in their business activities. As a result of this seizure, and a series of events that followed, on December 8, 1995, Plaintiffs Wrench Transportation Systems, Inc., and its sole shareholder, James Malone, Jr. (collectively "Plaintiffs"), commenced the instant cause of action against Defendants Frank Bradley (New Jersey state investigator), John Kennedy (Deputy Attorney General of New Jersey), Marianne Lewiki (New Jersey state investigator), and Leah Ann McMahon (Deputy Attorney General of New Jersey) pursuant to 42 U.S.C. § 1983, alleging that Plaintiffs were deprived of their property, in violation of the substantive component of the Fourteenth Amendment's Due Process Clause.

2. Procedural Background

On September 16, 2003, this Court granted summary judgment to Defendants Kennedy and Lewicki on grounds of absolute immunity. By way of oral Opinion rendered on October 27, 2003, this Court also (1) granted summary judgment to Defendant

McMahon on absolute immunity grounds, and (2) denied summary judgment as to Defendant Bradley, finding that he was not entitled to qualified immunity.

On June 27, 2005, the Third Circuit reversed this Court's October 27, 2003 Order as to Defendant Bradley, finding that "[b]ecause Malone failed to connect Bradley's conduct to the continued retention of the vehicles in which Malone assertedly possessed a protected property interest, Bradley is entitled to summary judgment." *Wrench Transp. Servs., Inc. v. Bradley,* 136 Fed. Appx. 521, 524 (3d Cir.2005) (hereinafter "*Wrench I*"). Accordingly, by way of Order dated October 5, 2005, this Court entered summary judgment in favor of Defendant Bradley.

On December 21, 2006, the Third Circuit affirmed this Court's grant of summary judgment as to Defendants Kennedy and McMahon "insofar as Malone attempts to rest liability on their alleged attempts to force *James Malone to provide false testimony*." *Wrench Transp. Servs., Inc. v. Bradley,* 212 Fed. Appx. 92, 100 (3d Cir.2006) (hereinafter "*Wrench II*"). However, the Third Circuit reversed this Court's finding that Defendants Kennedy and McMahon were entitled to absolute immunity to the extent that such finding was "based upon their conduct in delaying the return of Malone's trucks and conditioning that return on the execution of a release." *Id.* at 101. Accordingly, by way of Order dated January 16, 2007, this Court vacated its prior entry of summary judgment as to Defendants

Kennedy and McMahon, insofar as it was based upon their assertion of absolute immunity with respect to their conduct in delaying the return of property belonging to Plaintiffs, and conditioning the return of said property on the execution of a release.

This case was thus re-opened on January 16, 2007, and cross-motions for summary judgment were filed by the parties on March 23, 2007. Oral argument was held before this Court on July 23, 2007. Plaintiffs now argue that they are entitled to summary judgment as to the liability of Defendants Kennedy and McMahon for violating Plaintiffs' substantive due process rights.[1] Defendants Kennedy and McMahon, on the other hand, claim that (1) Plaintiffs have failed to establish a viable substantive due process claim, and (2) in any event, they are entitled to qualified immunity for their conduct.

Even in the absence of the Third Circuit's directive, this Court would, in any event, decline to

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[1] Plaintiffs also attempt to re-open discovery by challenging a protective order issued by Magistrate Judge Hedges on December 22, 1997 as part of their cross-motion for summary judgment. The Court need not address this argument as the Third Circuit already found, in the context of *Wrench II*, that (a) Plaintiffs failed to properly object to Magistrate Judge's December 22, 1997 ruling, and (b) any prejudice to Plaintiffs that would result in the absence of the Court's review of Magistrate Judge Hedges' decision "is not sufficient to establish the 'manifest injustice' required to review an issue in the absence of a properly filed objection to a Magistrate Judge's ruling." *Wrench II*, 212 Fed. Appx. at 101.

entertain Plaintiffs' attempt to re-open discovery. By way of Order dated February 7, 2007, this Court ordered that *all* discovery-related motions be filed within fifteen days of entry of that Order. Plaintiffs failed to file any such motion within fifteen days. Instead, without leave of Court, Plaintiffs made a belated attempt to re-open discovery by challenging Magistrate Judge Hedges' December 22, 1997 protective order in the context of their cross-motion for summary judgment, which was filed on March 23, 2007 – well over fifteen days from entry of this Court's February 7, 2007 Order.

LEGAL STANDARD

A court shall grant summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

On a summary judgment motion, the moving party must show, first, that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to present evidence that a genuine, fact issue compels a trial. *Id.* at 324. In so presenting, the non-moving party must offer specific facts that establish a genuine issue of material fact, not just "some metaphysical doubt as to the material facts."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Thus, the nonmoving party may not rest upon the mere allegations or denials in its pleadings. *See Celotex*, 477 U.S. at 324. Further, the non-moving party cannot rely on unsupported assertions, bare allegations, or speculation to defeat summary judgment. *See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252 (3d Cir.1999). The Court must, however, consider all facts and their reasonable inferences in the light most favorable to the non-moving party. *See Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir.1995).

For purposes of efficiency, the Court will first address Defendants' motion for summary judgment.

DISCUSSION

1. Plaintiffs' Section 1983 Claim

Plaintiffs claim that Defendants, while acting under color of state law, deprived Plaintiffs of their interest in the vehicles, in violation of Plaintiffs' constitutional rights pursuant to 42 U.S.C. § 1983.[2] In

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[2] Section 1983 states in relevant part: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983.

particular, Plaintiffs claim that "[t]he evidence shows that Kennedy and McMahon callously refused to return plaintiffs' seized vehicles that they knew were necessary to his livelihood so that they could coerce Malone into providing testimony against other targets of Operation Boilermaker and in order to procure personal releases from any liability for these actions." (Pl. MSJ at 19).

To establish section 1983 liability, a plaintiff must show "that the official acting under color of state law caused the deprivation of a federal right." *Hafer v. Melo,* 502 U.S. 21, 25 (1991) (quoting *Kentucky v. Graham,* 473 U.S. 159, 166 (1985)).[3] This is because section 1983 itself is not a source of substantive rights, but provides a vehicle for vindicating the violation of rights created by the United States Constitution or federal law. *See Graham v. Connor,* 490 U.S. 386, 393-94 (1989); *Morse v. Lower Merion School Dist.,* 132 F.3d 902, 907 (3d Cir.1997). Thus, in particular, Plaintiffs allege that Defendants' conduct – in delaying the return of the seized vehicles, and conditioning said return on their execution of a release – deprived Plaintiffs of their property, in violation of the substantive component of the Fourteenth Amendment's Due Process clause.

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[3] Defendants do not dispute that they are state actors for purposes of this § 1983 cause of action.

2. Substantive Due Process Claim

As a preliminary matter, the Court reiterates that the *sole* claim at issue is Plaintiffs' substantive due process claim.[4] Plaintiffs do not allege a violation of the procedural component of the Due Process Clause.[5] *See generally Wrench I,* 136 Fed. Appx. at 523.

"A property interest that falls within the ambit of substantive due process may not be taken away by the state for reasons that are 'arbitrary, irrational, or tainted by improper motive,' or by means of government conduct so egregious that it 'shocks the conscience.'" *Nicholas v. Pennsylvania State Univ.,* 227 F.3d 133, 139 (3d Cir.2000) (citations omitted).[6] However, to prevail on a non-legislative substantive due process claim, Plaintiffs must first establish

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[4] Moreover, the sole conduct at issue is Defendants' delay in returning the seized vehicles, and the conditioning of said return on the execution of a release. *See Wrench II,* 212 Fed. Appx. at 100 (granting summary judgment in favor of Defendants Kennedy and McMahon "insofar as Malone attempts to rest liability on their alleged attempts to force James Malone to provide false testimony.").

[5] Moreover, Plaintiffs acknowledge that they could have challenged the deprivation of their property through the procedural due process safeguards that existed in the context of the civil forfeiture proceeding. *See* Tr. (July 23, 2007) at 19:6-20:17.

[6] *See generally United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA,* 316 F.3d 392, 400 (3d Cir.2003) (clarifying that "executive action violates substantive due process only when it shocks the conscience.").

that they have a protected property interest to which the Fourteenth Amendment's due process protection applies. *See, e.g., Hill v. Borough of Kutztown,* 455 F.3d 225, 235 n. 12 (3d Cir.2006); *Desi's Pizza, Inc. v. City of Wilkes-Barre,* 321 F.3d 411, 427 (3d Cir.2003); *Nicholas,* 227 F.3d at 140. In addition, Plaintiffs must establish a causal link between the constitutional violation alleged and the harm that Plaintiffs claim followed it. *See, e.g., Miller v. City of Philadelphia,* 174 F.3d 368, 374 n. 5 (3d Cir.1999).

A. Causal Connection

In order to show that certain state action caused Plaintiffs' injury, Plaintiffs must establish a "causal link between an alleged unconstitutional act and the harm that a plaintiff claims followed it." *Miller,* 174 F.3d at 374 n. 5; *see also Wrench I,* 136 Fed. Appx. 521, 523 (3d Cir.2005). For example, in the context of *Wrench I,* the Third Circuit explained:

> To the extent Malone was deprived of his property, that deprivation was caused by the operation and application of New Jersey's civil forfeiture statute. Malone abandoned a constitutional attack on the direct cause of his injury by forgoing a procedural due process challenge to the forfeiture statute. Therefore, in order to assert a constitutional violation, and satisfy the threshold inquiry set forth by *Saucier,* Malone must establish some connection between Bradley and the civil forfeiture action by showing that Bradley either interfered with the dismissal

> of the action or breached a duty to recommend that the action be dismissed.

Id. Here, Defendants argue that "the record is undisputed that neither of the line Deputy Attorneys General, Kennedy and McMahon, had the authority to dismiss either the criminal or civil proceedings against the Plaintiffs." (Def. S.J. Br. at 41). This Court will now address Defendants' argument as it relates to each remaining Defendant.

Defendant Kennedy

Defendants claim that Defendant Kennedy, who, at all relevant times was a DAG assigned to the Environmental Crimes Bureau of the Division of Criminal Justice, "had no responsibility whatsoever for the civil action." (Def. Statement of Material Facts, ¶ 30). In particular, Defendants argue that "DAG Kennedy had no involvement, whatsoever, in the offer of the mutual release, or in the civil forfeiture litigation." (Def. S.J. Br. at 43). Therefore, Defendants' claim that Plaintiffs cannot establish the requisite causal connection between Kennedy's actions and Plaintiffs' injuries – namely the deprivation of his property. (*Id.* at 40-41).

In response, Plaintiffs point to a letter written by Defendant Kennedy on December 27, 1993, stating that "if I and other members of the Division of Criminal Justice are satisfied by Mr. Malone's statement that he and Wrench Transportation, Inc. ("Wrench") are innocent of any criminal involvement,

I will recommend to DAG McMahon that the forfeiture complaint be dismissed." (Pl.'s Response to Def. Statement of Material Facts, ¶ 30, App. Volume IV, A-904). Plaintiffs claim that the December 27th letter written by Kennedy demonstrates his "authority with respect to returning the vehicles." (Pl.'s Response to Def. Statement of Material Facts, ¶ 71). However, the causation analysis does not turn on whether Kennedy possessed the authority to dismiss the civil forfeiture action. Instead, summary judgment must be granted unless Plaintiffs raise a genuine issue of material fact as to whether Kennedy "actually exercised any authority reaching the forfeiture action." *Wrench I*, 136 Fed. Appx. at 523 n. 1. The December 27th letter – indicating that Kennedy would be willing to make a recommendation to Defendant McMahon that the forfeiture complaint be dismissed – does not demonstrate that Kennedy actually "interfered with the dismissal of the action or breached a duty to recommend that the action be dismissed."[7] To the contrary, evidence contained in the record indicates that even after Kennedy met with Malone on December 30, 2003, he was "still very much on the fence about whether [Malone] was truthful."[8] (Def. Statement of Material Facts, ¶ 135; Flanagan Aff., Ex. 9, Tr. (June 14, 2002) at 62:8-11).

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[7] *Wrench I*, 136 Fed. Appx. at 523.

[8] The relevant excerpt from Kennedy's June 14, 2002 deposition transcript is as follows:

(Continued on following page)

Plaintiffs essentially concede the absence of specific evidence establishing a causal connection between Defendant Kennedy and the outcome of the forfeiture proceedings. For example, during oral argument held on July 23, 2007, this Court specifically asked Plaintiffs' counsel the following questions:

> THE COURT: Where is your evidence that Kennedy was involved in that part?
>
> MR. BARDIS: Your Honor, I think it was from his office, and McMahon was working with Kennedy, and Kennedy also has the correspondence establishing that he would conduct a hearing, and he and Mr. Malone, would have a meeting, an informal meeting.
>
> THE COURT: That he would conduct the meeting?
>
> MR. BARDIS: He would have a meeting.
>
> THE COURT: What is the evidence that Kennedy was involved in conditioning the

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Q. So it would be fair to say that after the meeting, each of you would have had an opinion as to whether or not Mr. Malone on behalf of Wrench Transportation was truthful or untruthful?

A. I don't know if everyone formed an opinion about that.

Q. Do you know if you did?

A. I was very much on the fence about whether he had been truthful. I certainly was not convinced. But I would say that I was on the fence. Tr. (June 14, 2002) at 62:2-11.

> release of the property on the signing of the release?
>
> MR. BARDIS: Your Honor, they are from the same department.

See Tr. (July 23, 2007) at 45:13-15.

Thus, at best, Plaintiffs theorize that because Defendants McMahon and Kennedy "are from the same department," Kennedy must, therefore, have conspired with McMahon in delaying the return of the vehicles. However, "[i]t is not sufficient at the summary judgment stage for Malone, the non-moving party, to rest on allegations of a conspiracy. Rather, in order to raise a genuine issue of material fact he must produce sufficient evidence to allow a reasonable jury to find that a conspiracy existed." *Wrench I,* 136 Fed. Appx. at 523. Because Plaintiffs have come forward with no evidence establishing a causal connection between Kennedy's actions and Plaintiffs' alleged injuries, Defendants' motion for summary judgment as to Defendant Kennedy is hereby granted.[9]

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[9] Even assuming, *arguendo,* that Plaintiffs *had* demonstrated a sufficient causal connection between Kennedy's actions and Plaintiffs' injuries, for the reasons discussed herein, Defendant Kennedy would nevertheless be entitled to qualified immunity for such actions inasmuch as Plaintiffs have failed to establish that their interest in the seized vehicles constitutes a protected property interest to which the Fourteenth Amendment's substantive due process protection applies.

Defendant McMahon

Defendants argue that "[o]nly a supervisor in the Civil Remedies and Forfeiture Bureau would have any final decision making authority regarding a seizure and forfeiture." (Def. Statement of Material Facts, ¶ 71). Defendant McMahon was a DAG assigned to the Civil Remedies Bureau of the Division of Criminal Justice. (*Id.*, ¶ 2). Because McMahon was not a supervisor in the Civil Remedies and Forfeiture Bureau, Defendants argue that McMahon had no authority to dismiss the forfeiture proceedings. (Def. S.J. Br. at 41). Therefore, according to Defendants, Plaintiffs cannot establish the requisite causal connection between McMahon's actions and Plaintiffs' injuries. (*Id.* at 40-41).

Plaintiffs, on the other hand, allege that "McMahon stated at the conclusion of Malone's interview under oath . . . that she would process the papers to return Malone's vehicles," thus demonstrating McMahon's "authority with respect to returning the vehicles." (Pl.'s Response to Def. Statement of Material Facts, ¶ 71). Because Defendants concede that "[d]uring the course of the civil litigation, DAG McMahon offered to settle the State's forfeiture case against Wrench,"[10] the Court finds that a sufficient causal connection between McMahon's actions and Plaintiffs' alleged injuries has been

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[10] *See* Def. S.J. Br. at 43; Def. Statement of Material Facts, ¶ 74.

established. As a result, the Court will proceed with its analysis of Defendants' arguments as they relate to Defendant McMahon.

B. Qualified Immunity[11]

Defendants claim that they are entitled to qualified immunity from Plaintiffs' section 1983 claim, and are thus shielded from suit. *See generally Saucier v. Katz,* 533 U.S. 194, 200-01 (2001); *Wright v. City of Philadelphia,* 409 F.3d 595, 599 (3d Cir.2005). "The Supreme Court has set forth a two-step objective reasonableness test to determine whether qualified immunity should be granted." *Barton v. Curtis,* 497 F.3d 331, 335 (3d Cir.2007). The threshold inquiry, in determining whether a party is entitled to qualified immunity is whether, viewing the facts in the light most favorable to Plaintiffs, the facts alleged show that Defendants' conduct violated a constitutional right. *See, e.g., Saucier,* 533 U.S. at 201; *Wright,* 409 F.3d at 600. Thus, Plaintiffs bear the initial burden of showing

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[11] The Court disagrees with Plaintiffs' conclusory assertion that Defendants' entitlement to qualified immunity "was rejected by the Third Circuit." (Pl. Opp'n Br. at 41). To the contrary, the Third Circuit specifically stated that, "to the extent that Malone is arguing that Kennedy and McMahon are not entitled to either absolute or qualified immunity, Appellants' argument is meritless, and can be rejected without discussion." *Wrench II,* 212 Fed. Appx. at 95 n. 3; *see also Schrob v. Catterson,* 948 F.2d 1402, 1419 (3d Cir.1991) ("Qualified immunity will provide sufficient protection to prosecutors managing seized property.").

that Defendants' conduct violated a constitutional right. *See, e.g., Sherwood v. Mulvihill,* 113 F.3d 396, 399 (3d Cir.1997). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *See Saucier,* 533 U.S. at 201.

However, if a favorable view of the Plaintiffs' submissions reveals the violation of constitutional right, this Court must determine whether such a right was clearly established. *See id.; Wright,* 409 F.3d at 600. To be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Saucier,* 533 U.S. at 202; *Barton,* 497 F.3d at 335. Plaintiffs, again, bear the burden of demonstrating that the constitutional or statutory rights at issue were clearly established. *See, e.g., Sherwood,* 113 F.3d at 399. If the Court finds that Defendants violated such clearly established constitutional or statutory rights, they are not entitled to qualified immunity for their actions. *See, e.g., Wright,* 409 F.3d at 599-600.

(i) Violation of a Constitutional Right[12]

It is clear that, as a threshold matter, in adjudicating Plaintiffs' section 1983 claim, the Court must consider whether a constitutional violation occurred. *See Saucier*, 533 U.S. at 201. Similarly, in assessing Defendants' qualified immunity defense, the Court must first determine whether Defendants' conduct

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[12] Plaintiffs' contention that this Court has already ruled, with respect to Defendant Bradley, that Plaintiffs had a clearly established constitutional right to their property, is well taken. *See* Tr. (Oct. 27, 2003) at 16:23-25. Nevertheless, given that (a) the issue has now been the subject of far more extensive briefing, and (b) this Court's October 27, 2003 decision with respect to Defendant Bradley was reversed by the Third Circuit, albeit on different grounds, *see Wrench I*, 136 Fed. Appx. at 522, the Court will revisit the issue of qualified immunity, in its entirety. *See, e.g., Higgins v. California Prune & Apricot Grower, Inc.*, 3 F.2d 896, 898 (2d Cir.1924) (explaining that "it is now well settled that the 'law of the case' does not rigidly bind a court to its former decisions") (citing *Messenger v. Anderson*, 225 U.S. 436 (1912)). Furthermore, because summary judgment was granted as to Defendant Bradley by the Third Circuit, this approach will not affect the disposition of Plaintiffs' case as against said defendant.

> To the extent that Plaintiffs claim that they have successfully demonstrated the existence of a constitutional violation based findings made by Judge Lifland at the motion to dismiss stage, any such argument is meritless. *See, e.g., S.C. v. Deptford Tp. Bd. of Educ.*, No. 01-5127, 2006 WL 1784591, at *14 (D.N.J.) (explaining that "the law of the case doctrine does not prevent a court from granting summary judgment where a court previously denied a motion to dismiss using the more liberal standards governing Rule 12 motions").

violated a constitutional right. *See id.* Thus, regardless of whether the Court first considers Plaintiffs' 1983 claim, or Defendants' qualified immunity defense, the inquiry begins with an assessment of whether a constitutional violation has occurred.

Plaintiffs argue that "[t]he evidence shows that Kennedy and McMahon callously refused to return plaintiffs' seized vehicles that they knew were necessary to his livelihood so that they could coerce Malone into providing testimony against other targets." (Pl. S.J. Br. at 19). According to Plaintiffs, such conduct deprived Plaintiffs of their property, in violation of the substantive component of the Due Process Clause. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." *Nicholas,* 227 F.3d at 138. Thus, while the Fourteenth Amendment protects certain property interests, "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." *Id.* at 140 (quoting *Reich v. Beharry,* 883 F.2d 239, 243 (3d Cir.1989)). "Rather, to state a substantive due process claim, 'a plaintiff must have been deprived of a particular quality of property interest.'" *Id.* (quoting *DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 598 (3d Cir.1995)). The determination of whether a particular property interest constitutes this "particular quality" depends on whether the interest is "fundamental" under the Constitution. *See, e.g., id.* Thus, in order to prevail on a non-legislative

substantive due process claim, Plaintiffs must establish that they have a protected property interest to which the Fourteenth Amendment's due process protection applies. *See, e.g., Hill,* 455 F.3d at 235 n. 12; *Desi's Pizza, Inc.*, 321 F.3d at 427; *Nicholas,* 227 F.3d at 140.[13]

Plaintiffs characterize the alleged constitutional violation as:

> The intentional and substantive wrong that defendants committed when they intentionally refused to remit the Wrench vehicles notwithstanding the defendants' collective belief in Malone's innocense [sic] and the conditioning of the return of the vehicles on Malone's provision of false testimony and a personal release for all defendants. This motive was improper and lead to the dispossession of plaintiffs' property, therefore, plaintiffs have a claim for a deprivation of substantive due process constitutional rights.

(Pl. Opp'n Br. at 37).[14] Based on Plaintiffs rather ambiguous characterization, the Court construes the

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[13] In *Wrench I,* the Third Circuit specifically declined to express an opinion as to whether "an owner's interest in vehicles properly seized and held subject to a forfeiture action is protected by the Due Process Clause of the Fourteenth Amendment." *Wrench I,* 136 Fed. Appx at 522.

[14] Plaintiffs' Amended Complaint similarly alleges that:

> Defendants' intentional use of the continued forfeiture of Wrench's vehicles to coerce Malone into cooperating

(Continued on following page)

alleged property interest at issue as Plaintiffs' interest in the seized vehicles.

Defendants argue that no constitutional violation has occurred because Plaintiffs' substantive due process claim is grounded in the notion that Defendants' actions deprived them of their interest in the seized vehicles, in violation of their substantive due process rights; however, the Third Circuit has limited its substantive due process protection of property interests to real property. (Def. S.J. Br. at 40).

Defendants correctly note that the Third Circuit has "so far limited non-legislative substantive due process review to cases involving real property ownership," and has admittedly been reluctant to extend substantive due process protection. *Nicholas*, 227 F.3d at 141 (citing to *Collins v. City of Harker Heights*, 503 U.S. 115 (1992)).[15] Plaintiffs provide no

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> with their criminal investigation of third parties deprived Wrench Transportation Systems, Inc. and Malone of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(Am.Compl., ¶ 38).

[15] In *Collins*, the United States Supreme Court explained the following:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important,

(Continued on following page)

legal basis to refute Defendants' position.[16] To the contrary, Plaintiffs' opposition brief is replete with broad and conclusory statements lacking specific legal support. For example, Plaintiffs argue that

> A reasonable person would be aware that these actions are wrong, unlawful and violative of the most fundamental and well known constitutional rights enjoyed by citizens of the United States of America. . . .

> therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive her husband of that right.

503 U.S. 115, 125 (1992) (internal citation omitted).

[16] Plaintiffs' reliance on *Reitz v. County of Bucks*, 125 F.3d 139 (3d Cir.1997), and *Schrob v. Catterson*, 948 F.2d 1402 (3d Cir.1991) for the generalized proposition that "[a] state official that seizes property and wrongfully retains it thereafter violates the owner's constitutional rights and may be liable under 42 U.S.C. § 1983" is misplaced for the following reasons. (Pl. Opp'n Br. at 41). First, the Third Circuit did not address – much less determine – whether the property interest at issue in *Reitz* is protected by the substantive component of the Due Process Clause. Secondly, the Court's analysis in *Schrob* was limited to the defendant's entitlement to absolute immunity. *See Schrob*, 948 F .2d at 1407 n. 4 ("With respect to qualified immunity, the record before us on this motion to dismiss is so limited that we cannot decide whether the rights that Catterson and the Agents allegedly violated were clearly established, or even established in the first place."). Plaintiffs' reliance on *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir.1985), and *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir.1982) – neither of which appear to involve substantive due process claims – is likewise unavailing.

In short, refusing to return property that is needed for someone's livelihood when you know they are innocent so that you can obtain a release is improper, against well established law and conscience shocking. (Pl. Opp'n Br. at 43). Similarly, during oral argument, Plaintiffs' counsel presented several broad theories in support of the proposition that Plaintiffs' interest in the seized vehicles is fundamental under the Constitution, and, therefore, that the deprivation of such property interest constitutes a violation of the substantive component of the Due Process Clause. In particular, Plaintiffs' counsel argued that: (1) the seized vehicles "were part and parcel of the inter-dependent relationship that Malone had in exercising his right to contract,"[17] and (2) "it is in Mr. Malone's life and liberty to freely engage in business. These vehicles were closely or were the essence of his business."[18] The Court will address each argument, in turn.

(a) Right to Contract

Plaintiffs' counsel argued, during the July 23, 2007 oral argument, that the constitutional violation at issue is "[t]he right to freely enter into a contract." Tr. (July 23, 2007) at 23:1-2. As a preliminary matter, the Court notes that this argument was not raised in Plaintiffs' opposition brief; rather, it was raised for

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[17] Tr. (July 23, 2007) at 22:14-16.

[18] *Id.* at 18:22-24.

the first time during oral argument. Therefore, this argument will not be considered, as it was not properly before this Court. *See, e.g., Garver v. Garver,* No. 96-2507, 1997 WL 47801, at *6 n. 1 (S.D.N.Y. Feb. 5, 1997). Even if the Court were inclined to entertain such an argument, Plaintiffs provide no legal or factual basis to substantiate such a theory.

(b) Right to "Engage in Business"

At oral argument, Plaintiffs' counsel also characterized the fundamental right at issue as Plaintiffs' right to "engage in business." Tr. (July 23, 2007) at 18:22-24. In particular, Plaintiffs' counsel explained that "these were the vehicles that were the sole source of his livelihood and the livelihood of the employees that he had under him." Tr. (July 23, 2007) at 23:15-17. Again, the Court notes that this argument was not expressly raised in Plaintiffs' opposition brief. Accordingly, it is not properly before this Court and need not be considered. Even if the Court were inclined to consider this argument, for the reasons that follow, the Court finds that Plaintiffs have failed to meet their burden in demonstrating that one's right to "engage in business" is fundamental under the Constitution.

As a preliminary matter, the Court construes Plaintiffs' argument in this regard as akin to the argument that employment rights are fundamental. Although the parties did not brief this issue – because it was raised for the first time at oral argument – the

Court notes that the plaintiff in *Nicholas* made a similar argument in claiming that his tenured professorship was a property interest worthy of substantive due process protection. *See Nicholas*, 227 F.3d at 136. In particular, the plaintiff in that case claimed that defendants violated the substantive component of the Fourteenth Amendment's Due Process Clause by "firing him for an arbitrary, irrational or improper reason." *Id.* at 138.

The Third Circuit began its analysis by addressing the issue of whether the plaintiff's property interest in his tenured professorship was entitled to substantive due process protection. In finding that it was not,[19] the Third Circuit explained, in relevant part, as follows:

> Nicholas's tenured public employment is a wholly state-created contract right; it bears little resemblance to other rights and property interests that have been deemed fundamental under the Constitution. We agree with the analysis of the District Court in *Homar v. Gilbert* that "it cannot be reasonably maintained that public employment is a property interest that is deeply rooted in the Nation's history and traditions." Nor does public employment approach

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[19] In finding that the plaintiff's property interest in his tenured professorship was not entitled to substantive due process protection, the Third Circuit joined the majority of the courts of appeals that have addressed the issue. *See Nicholas*, 227 F.3d at 142.

> the interests "'implicit in the concept of ordered liberty like personal choice in matters of marriage and family.'" Accordingly, we view public employment as more closely analogous to those state-created property interests that this Court has previous deemed unworthy of substantive due process than to the venerable common-law rights of real property ownership implicated in *DeBlasio*.

Nicholas, 227 F.3d at 143 (internal citations omitted); *see also Collins*, 503 U.S. at 128 (explaining that "state law, rather than the Federal Constitution, generally governs the substance of the employment relationship."). In light of the foregoing, to the extent that Plaintiffs analogize the deprivation of their right to their vehicles as a deprivation of their right to "engage in business" or to pursue their "livelihood," Plaintiffs have failed to meet their burden in establishing that such interests – much like employment rights – are fundamental. *See, e.g., Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir.2005) (stating that the "right to 'make a living' is not a 'fundamental right,' for either equal protection or substantive due process purposes.").

Therefore, given (1) the Third Circuit's limitation of property interests worthy of (nonlegislative) substantive due process protection to real property ownership,[20] (2) the Third Circuit's reluctance to

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[20] *See Nicholas*, 227 F.3d at 141.

extend substantive due process protection "to other, less fundamental property interests,"[21] including employment rights, (3) the United States Supreme Court's cautioning to lower courts to exercise "the utmost care whenever we are asked to break new ground in this field,"[22] and (4) Plaintiffs' failure to provide the Court with *any* legal basis in support of their assertion that an owner's interest in his vehicles is a fundamental right created by the Constitution, the Court determines that Plaintiffs have failed to establish that their interest in the seized vehicles constitutes a protected property interest to which the substantive component of the Due Process Clause applies.[23] *See generally Desi's Pizza*, 321 F.3d at 427 (expressing "serious doubts" over whether plaintiffs' allegations – that defendants wrongfully deprived plaintiffs of their ability to put their bar/restaurant to "productive use" – state a substantive due process claim). Therefore, because Plaintiffs have failed to establish a violation of their substantive due process rights, Defendant McMahon is entitled to qualified immunity for her actions in delaying the return of the seized vehicles, and conditioning the return of the

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[21] *Id.*

[22] *See Collins*, 503 U.S. at 124.

[23] The Court, therefore, need not determine (a) whether Defendants' actions rise to the level of conscience shocking, or (b) whether Defendants' actions were objectively reasonable in light of the clearly established law.

vehicles on the execution of a release.[24] *See, e.g., Saucier,* 533 U.S. at 201. Accordingly, the Court grants Defendants' motion for summary judgment as to Defendant McMahon.

CONCLUSION

For the reasons set forth above, the Court grants Defendants' Motion for Summary Judgment as to Defendants Kennedy and McMahon. Plaintiffs' Motion for Summary Judgment is, therefore, denied as moot.

An appropriate Order accompanies this Opinion.

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[24] It is unclear whether this Court's finding should result in a dismissal of Plaintiffs' Amended Complaint based on Plaintiffs' failure to establish a cause of action under section 1983 or based on qualified immunity. *See Wright v. City of Philadelphia,* 409 F.3d 595, 600 (3d Cir.2005). The parties do not brief this issue. The Third Circuit admittedly has been inconsistent on this issue. *See id.* However, the Third Circuit emphasized that "[a]s a practical matter, the outcome will be the same whether we conclude that the officers are immune from suit or instead, that the plaintiff has no cause of action." *Id.*

NOT FOR PUBLICATION **CLOSED**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WRENCH TRANSPORTATION, et al., Plaintiffs,	Civil Action No.: 95-cv-06203 (JLL)
FRANK BRADLEY, et al., Defendants.	**ORDER**

LINARES, District Judge.

This matter comes before the Court by way of cross-motions for summary judgment filed by Plaintiffs Wrench Transportation Systems, Inc. and James Malone, Jr. [CM/ECF Docket Entry No. 101], and Defendants John Kennedy and Leah Ann McMahon [CM/ECF Docket Entry No. 100]. For the reasons set forth in this Court's corresponding Opinion dated November 5, 2007,

IT IS, on this **28th day of November, 2007**,

ORDERED that Defendants' motion for summary judgment [CM/ECF Docket Entry No. 100] is **GRANTED**; and it is further

ORDERED that Plaintiffs' motion for summary judgment [CM/ECF Docket Entry No. 101] is **DENIED** as moot; and it is further

ORDERED that this case is hereby **CLOSED**.

/s/ Jose L. Linares
JOSE L. LINARES
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

07-4817

WRENCH TRANSPORTATION SERVICES, INC.;
JAMES MALONE, JR.,

Appellants

v.

FRANK BRADLEY; JOHN F. KENNEDY;
MARYANNE LEWICKI; LEAH ANN MACMAHON

SUR PETITION FOR REHEARING

(Filed Oct. 16, 2009)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, *Circuit Judges*, and RESTANI, *Chief Judge Court of International Trade**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the

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* As to panel rehearing only.

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: October 16, 2009

CH/cc: Constantine Bardis, Esq.
Brian G. Flanagan, Esq.